No. 3465

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARY J. DILLON (formerly Mary J. Tynan) and THOMAS B. DILLON,
Plaintiffs in Error,

vs.

NORVENA LINEKER and FREDERICK V. LINEKER,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

JOHN L. TAUGHER,
Attorney for Defendants in Error.

PERNAU-WALSH PRINTING CO.

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Statement of the Case.

This was an action brought by Norvena Lineker and Frederick V. Lineker, plaintiffs in the court below, who are citizens of the Dominion of Canada, to recover the damages suffered by them by reason of the breach by defendants in the court below, of a certain contract of indemnity whereby the defendant Mary J. Dillon agreed to save the plaintiff Norvena Lineker harmless from any and all loss or damage under or by reason of a certain trust deed made by the said plaintiff Norvena Lineker to one Daniel A. McColgan by means of which the said Norvena Lineker (then Norvena Svensen) trans-

ferred to R. McColgan as trustee for his brother, Daniel A. McColgan, certain valuable land in Stanislaus County, State of California, as in said deed described, to secure the repayment of $2850.00 then loaned and the interest that would accrue thereon *and also to secure* all future advances that might be made on the property therein described with interest thereon *and also to secure* all costs and liens that might be thereafter unpaid upon such lands *and also to secure* all expenses that might be incurred by said R. McColgan and Daniel A. McColgan in connection therewith.

Under and by means of such deed of trust the plaintiff Norvena Lineker borrowed certain moneys from Daniel A. McColgan for the use and benefit of the defendant Mary J. Dillon (then Mary J. Tynan) and her son William Winter and such money *together with other moneys subsequently borrowed under said trust deed as shown by the evidence introduced at the trial* had been turned over by the plaintiff Norvena Lineker to William Winter to be expended in repairing and furnishing a certain hotel and hotel building owned by the defendant Mary J. Dillon.

The first money so borrowed by the plaintiff Norvena Lineker under such deed of trust was the sum of $2850.00. She subsequently borrowed other money thereunder in like manner from said McColgan, which she in like manner turned over to said Winter to be used in connection with rehabilitating the hotel belonging to said defendant Mary J.

Dillon and said moneys were expended for the use and benefit of said defendant Mary J. Dillon.

Note—defendants below in their answer allege as follows:

> "That after the execution of said deed of trust the said Norvena Lineker from time to time procured other advances thereunder until the amount due upon said deed of trust was in excess of the sum of $7000" (see transcript of record p. 26).

Several months after said moneys had been loaned under said deed of trust as aforesaid, and in or about the month of April, 1911, Daniel A. McColgan went to the plaintiff Norvena Lineker and demanded repayment of the moneys due under said deed of trust and told her that if she failed to pay same, he would cause her interest in said real property to be sold.

Thereupon the said plaintiff Norvena Lineker went to said defendant Mary J. Dillon and demanded of her that she immediately pay and satisfy the moneys borrowed for her use and benefit as aforesaid and also pay the interest, costs and expenses connected therewith *and also* that she, the said Mary J. Dillon, immediately effect the satisfaction and cancellation of said trust deed, and said plaintiff Norvena Lineker then and there told said defendant Mary J. Dillon that if she neglected or failed to pay such moneys or to forthwith cause said trust deed to be satisfied and discharged, the said plaintiff would immediately bring action at law against said

defendant Mary J. Dillon and her son William Winter to recover the amount due under such deed of trust.

Thereupon the defendant Mary J. Dillon asked and importuned said plaintiff Norvena Lineker to refrain from commencing or prosecuting an action against her or her son concerning the moneys secured by said deed of trust, and said defendant then and there promised and agreed with said plaintiff that if said plaintiff would refrain from instituting or prosecuting an action against said defendant Mary J. Dillon or her son concerning said moneys secured by said deed of trust that she, the said defendant Mary J. Dillon, would cause said debt and the interest, costs and expenses to be paid and satisfied and that she would indemnify and save harmless the plaintiff Norvena Lineker from any and all loss or damage whatever in connection with said trust deed. The said plaintiff thereupon and in consideration thereof refrained from bringing any action against said defendant Mary J. Dillon or her said son and she did not thereafter commence or prosecute any such action.

During the said year 1911 two hundred and fifty dollars was paid on account of interest due on the moneys secured by said trust deed, but no further payments were made until 1914 when proceedings were taken by McColgan to sell said real property under his trust deed. During this period from 1911 to 1914 a large amount of interest, costs, taxes and tax liens had accumulated against said property

and trust deed as well as attorney fees and the like. In 1914 McColgan sold said real property under his deed of trust and so manipulated the matter that he received for his rights under the trust deed, including costs, penalties, fees, and expenses claimed by him, the sum of $14,000.00 which amount was paid to him by giving him the net sum of $11,555.00 cash then loaned on the security of said real property by one Annie Connors, in the manner disclosed by the evidence introduced at the said trial, and in addition thereto giving *a second deed of trust on the said property for $2455.00,* and under this second deed of trust McColgan subsequently, in January, 1917, sold the land described in said original trust deed subject to the right therein of said Annie Connors.

Plaintiffs alleged in their complaint that the loss suffered by them by reason of the failure and neglect of defendant Mary J. Dillon to perform her said contract was the sum of $35,000.00.

Plaintiffs' complaint was filed on October 30, 1918. On November 7, 1918, defendants filed a demurrer to plaintiffs' complaint, alleging various grounds of demurrer. The demurrer was continued on the law and motion calendar from time to time, and on December 3, 1918, and *before any hearing was asked or had thereon, the defendants filed an answer to the merits, denying many of the allegations of plaintiffs' complaint and setting forth many new allegations of fact.* The demurrer was thereafter continued on the law and motion calendar for

several weeks and finally dropped from the calendar (see transcript of record p. 65). In due course the action came on to be tried by the court with a jury, and the trial lasted three days.

The evidence introduced on behalf of the plaintiffs at the trial (no summary of which is attempted to be made in this statement) was of so amazing a character that the trial judge in his instructions to the jury was moved to say:

> "Now, gentlemen of the jury, if that were the fact, if the evidence has established that to be the fact it would then constitute a contract which in law is known as a contract of indemnity, and if the party making it fails to keep it and damage has resulted to the one to whom it is made, it is, as I say, the subject-matter of a perfectly valid cause of action. That is the theory of the plaintiff's case. As you will observe from that, the main issue in the case is whether such a promise ever was made, because, of course, if the promise was not made, the plaintiff has no case, however grievously she may have suffered, *and goodness knows there stands out in this case the conspicuous fact, absolutely uncontroverted, that this woman has been, to use a cant expression, pigeoned, beyond the belief of ordinarily honest men.*" * * *

Evidence both oral and documentary was also introduced by defendants, and after full instructions by the court the case was submitted to the jury for their consideration and the jury duly returned a verdict in favor of the plaintiffs in the sum of $32,000.00. Thereafter motion for a new trial was made and after the plaintiffs had remitted $4000.00 the motion was denied.

During the whole course of the trial, which lasted three days, *not a single exception was taken to any ruling* made by the trial court, *nor was any exceptions taken to the instructions of the court,* but on the contrary counsel for both plaintiffs and defendants, in answer to a query of the court, *expressly stated* that they desired no further instructions and that they had no suggestions to make concerning the instructions given by the court.

On the case made on the writ of error herein, as presented to this court, the defendants in error would respectfully call the particular attention of this Honorable Court to the following rather unusual conditions:

(a) No bill of exceptions was made or filed herein because there were no objections or exceptions saved in the trial court.

(b) None of the evidence introduced at the trial is filed herein or presented to this court.

(c) The only *errors* that seem to be urged by plaintiffs in error herein are "such as appear upon the face of the complaint" (see brief of plaintiffs in error p. 2).

(d) There are no errors appearing "upon the face of the complaint" nor are there any errors showing upon the record and which it is not the office of the bill of exceptions to present, for the reason that *there was no ruling of any kind made by the court below concerning the pleadings.*

Note.—(The demurrer was abandoned and waived, no ruling therein being asked or made, and an answer to the merits filed, and trial had upon the issues made by the pleadings.)

(e) The *only rulings* made by the court below were the rulings made *on the questions of law arising at the trial*—and as to these *no objections were made nor exceptions saved.*

The defendants in error respectfully submit that the judgment of the court below should be affirmed by this Honorable Court for the following reasons:

1. Since no objections or exceptions were saved in the court below, *no questions of law arising at the trial can now be presented to or considered by this court.*

2. Since defendants' demurrer to the plaintiffs' complaint was waived and abandoned and no ruling thereon ever requested and no ruling ever made, *there is no error of the court below, appearing upon the record that can be passed upon by this court,* for the reason that (a) *the court below cannot be guilty of an error in a ruling that it has never made or upon an issue to which its attention was never called* (b) when the judgment of a trial court is challenged in error, *its rulings alone are open to consideration.*

3. The jurisdiction of the court to hear and determine the action is beyond question.

4. In the case at bar *there is no ruling of the trial court* either during the trial, or before, or after the trial, or with relation to the pleadings, *presented to this court for consideration.*

5. Since no error of the trial court is shown the judgment of that court should be affirmed by this Honorable Court.

I.

WHEN NO OBJECTIONS OR EXCEPTIONS WERE SAVED DURING THE TRIAL, NO QUESTIONS OF LAW ARISING AT THE TRIAL CAN BE PRESENTED TO OR CONSIDERED BY THIS COURT.

The rule relating thereto was recently declared by this court in Mitsui v. St. Paul Fire & Marine Ins. Co., (C. C. A. 9th) 202 Fed. 26-28, in the following language:

> "From an inspection of the bill of exceptions it is at once manifest that no objections or exceptions were saved, and *hence no question of law arising at the trial can now be presented to or considered by this court.*"

In Mexico Internat. Land Co. v. Larkin, (C. C. A. 8th) 195 Fed. 495-6, the Circuit Court of Appeals for the Eighth Circuit said:

> "In an action at law the burden is on the plaintiff in error to establish the existence of those errors of which he complains, and *in the absence of proof by the record* that a question of law arose, and that it was presented to and ruled upon by the court below, *no error is established, because none could arise concerning a question which was not presented, considered, or decided by the trial court.* Southern Pacific Company v. Arnett, 126 Fed. 75, 77, 61 C. C. A. 131, 133. Because there was no request and no ruling on a request, for a peremptory instruction in favor of the plaintiff, and because there was no exception to any ruling relative to the matters now assigned as error, *there is nothing in this case for this court to review.*
>
> *It is indispensable to a review* in the courts of the United States of any ruling of a trial court on the admissibility of evidence, or in the

> charge of the court, or the submission of the case to the jury *that the ruling of which complaint is made should be challenged, not only by an objection, but by an exception taken and recorded at the time,* to the end that the attention of the trial judge may be sharply called to the question presented, and that a clear record of his action and its challenge may be made. Potter v. United States, 122 Fed. 49, 55, 58 C. C. A. 231, and case there cited. The judgment below is affirmed."

In Mitsui v. St. Paul Fire Ins. Co., *supra,* this court further said:

> "Whenever *error* is apparent upon the record it is open to revision whether it be made to appear by bill of exception or any other manner,"

and the court therein specified as such error the erroneous overruling or sustaining of a demurrer. But, it is submitted, there must be *an erroneous ruling* to constitute such error.

There is one other question which this court might notice at any stage of the case and without the question being presented by a bill of exceptions, i. e., the one mentioned by Presiding Judge of this court on the argument hereof, to wit: a want of jurisdiction apparent upon the face of the record. But in the case at bar it is submitted that there is no error apparent upon the record, and neither is there any want of jurisdiction.

II.

THE DEMURRER IN THE COURT BELOW TO PLAINTIFFS' COMPLAINT WAS ABANDONED AND WAIVED.

As pointed out above in the statement of the case, before the defendants in the court below asked for or obtained any ruling upon their demurrer and while that demurrer was still upon the law and motion calendar they filed an answer to the merits denying nearly all of the allegations in the plaintiffs' complaint and setting up many new allegations of fact and thereafter the parties went to trial upon the pleadings so made. It is submitted that by so doing defendants waived any defects of the complaint, if there were any defects contained in said complaint.

In Oregon R. & N. Co. v. Dumas, (C. C. A. 9th) 181 Fed. 781, this court said:

> "The plaintiff in error contends that the complaint is fatally defective for failure to state a cause of action. A demurrer was interposed on this ground, *but it was waived by an answer to the merits.* In some respects the averments of the complaint are aided by the allegation of the answer."

In United Kan. Co. v. Harvey, (C. C. A. 8th) 216 Fed. 316-318, the court used the following language:

> "Such a practice can only serve as a trap. If the petition states a good cause of action but is technically defective, it should be raised by demurrer, and the plaintiff thus given an opportunity to amend. When an answer to the merits is filed, it is an admission on the part of the defendant that the petition is not technically

objectionable, and no defect of that nature can be taken advantage of thereafter. It is only when the defect of the petition is of such a nature *that it cannot be cured by the verdict of the jury,* and therefore can be taken advantage of by a motion in arrest of judgment after verdict, that is not waived by filing an answer. It is not right that the plaintiff should be misled by the defendant into the belief that there are no technical defects in his petition, and that his cause will be tried on the merits, and after he has been put to the expense of bringing his witnesses a considerable distance, which is usually the case when the cause is to be tried in a national court, and then, after the jury has been sworn, either taken a nonsuit or submit to a judgment against him, or at least consent to a continuance of the cause. It is true under the common-law practice, when pleadings were considered of greater importance than the substantial rights of the parties this practice was very common, but at this day it is universally recognized that courts are intended to promote the ends of justice and will disregard all technicalities which tend to defeat them. * * * In Bell v. Railroad Co., 4 Wall. 598, 18 L. Ed. 338, it was held that by a plea to the merits, and the parties going to a trial, *all antecedent irregularities are waived.* In Oregon R. R. & Navigation Co. v. Dumas, 181 Fed. 781 (104 C. C. A. 641), it was held that *'a demurrer to a complaint for want of facts is waived by an answer to the merits'.*"

In Bell v. Railroad Co., 4 Wall. (71 U. S.) 698-702, the court said:

"There is great confusion in the record in relation to the disposition of demurrers and pleas in abatement but as Bell filed a plea to the merits and the parties went to trial all antecedent irregularities were waived."

In Sledge v. Stolz, (May 15, 1919) 28 Cal. App. Dec. 1140-1144, the court stated the rule of law in California as follows:

> "On appeal all intendments are in favor of the regularity of the action of the court. Error will never be presumed and the burden is upon the appellant to show that it exists. (2 Hayne's New Trial, p. 1576.) In Meyers v. Canepa, 26 Cal. App. Dec. 1246, appellants claimed that the rule does not reach an error committed in passing upon the sufficiency of a complaint where the question is raised by demurrer. In reply the court said: 'Whatever may have been the interpretation put upon section 475 of the Code of Civil Procedure prior to the adoption of section 4½, article VI of the constitution, it settled that injury is no longer presumed from error, but must be affirmatively shown. (Vallejo etc. R. R. Co. v. Reed Orchard Company, 169 Cal. 545.) The provision is: "No judgment shall be set aside * * * for any error as to any matter of pleading, or for any error as to any matter of procedure, unless after an examination of the entire cause, *including the evidence,* the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." How can the court determine that defendants were injured by overruling the demurrer in this case *in the absence of the record showing what occurred at the trial?* It may have been that appellants consented to the trial upon its merits without objection to the evidence in support of the complaint, notwithstanding its defects. There may be presumptive waiver, which is a species of consent.'" * * *
>
> "In the recent case of Ransome-Crummey Co. v. Bennett, 171 Pac. 304, the question was directly before the court where, as here, there was a trial upon the merits after general demurrer improperly overruled and judgment, as here, on the findings, and *it did not appear* that the

> facts were such as that the complaint *could not* have been so amended as to obviate the objection made. The syllabus correctly states the rule as follows: 'Though by omission of an allegation, a complaint does not state a cause of action, and general demurrer thereto was improperly overruled, yet the record making it manifest judgment for plaintiff after a trial on the merits, was in no way based on or due to any defect in the complaint, it will not be sustained on the ground of insufficiency of the complaint; it not appearing it cannot be amended to obviate the defect.' "

In the case at bar the defendants filed their answer to the merits and without their demurrer having been brought to the court's attention or any ruling thereon made, and they thereby waived their demurrer.

Therefore *there was no ruling of the court below concerning the pleadings* nor was there any ruling made at any time prior to judgment except during the course of the trial.

But in addition to all of the foregoing the defendants in error submit that their complaint in the court below properly and fully sets forth and states a good cause of action against the defendants below; that such complaint contains all necessary jurisdictional allegations, both concerning the parties to the action and the amount in controversy, and further that the evidence introduced at the trial not only proved all the allegations of their complaint but *it amply supports the judgment rendered.*

III.

CONCERNING THE SPECIFICATION OF ERROR RELATING TO THE AMOUNT IN CONTROVERSY AS AFFECTING THE JURISDICTION

The plaintiffs below in their complaint allege under oath that the damages suffered by them by reason of the defendants' breach of the said contract of indemnity was the sum of $35,000.00.

The defendants below answered to the merits and denied that plaintiffs or either of them had been damaged in said or any sum or amount.

The case was submitted to the jury on the pleading and the evidence introduced at the trial and the instructions of the court, and the jury found that the plaintiffs had been damaged in the sum of $32,000.00 by reason of the defendants' breach of the said contract of indemnity, and judgment in favor of the plaintiffs in the court below and against the defendants was duly entered for the sum of $32,000.00 and costs.

It is submitted that this shows beyond cavil that the amount in controversy in the action exceeded the jurisdictional sum of $3000.

The rule relating thereto was stated by the Supreme Court in Smithers v. Smith, 204 U. S. 632-642, as follows:

> "The rule that the plaintiff's allegations of value govern in determining the jurisdiction, except where upon the face of his own pleadings it is not legally possible for him to recover the jurisdictional amount, controls even where the

declarations show that a perfect defense might be interposed to a sufficient amount of the claim to reduce it below the jurisdictional amount. Schunk v. Moline Co., 147 U. S. 500. In the last case the plaintiff's petition prayed judgment on several promissory notes, of which some, amounting to $530, were due, and others, amounting to $1664, were not due, the jurisdictional amount then, as now, being $2000. In holding that the court had jurisdiction of the claim this court, by Mr. Justice Brewer, said: 'Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute.' ''

See also:

Chesbrough v. Hotchkiss, 40 Sup. Ct. Rep. 237;

Mullins Lumber Co. v. Williamson, (C. C. A. 4th) 246 Fed. 232-233.

It is respectfully submitted that the contention of plaintiffs in error that the amount in controversy in this action is less than $3000, in view of the foregoing, is so frivolous as not to need further argument.

IV.

IF THERE IS NO RULING OF THE TRIAL COURT THAT THIS COURT CAN PASS UPON THERE CAN BE NO ERROR FOUND BY THIS COURT.

In deciding a similar point this court in Federal Mining Co. v. Hodge, (C. C. A. 9th) 213 Fed. 609, said:

> "The suggestion is made for the first time in this court. It was not brought to the attention of the court below, by any plea, proof or request for an instruction or ruling and no error is assigned to any action of the court below in regard to it. *This court can consider only errors of law in the rulings of the lower court* (citing many cases).

In Jones v. U. S., (C. C. A. 9th) 179 Fed. 584-592, this court stated the rule in the following language:

> "In an action at law this court is limited to the correction of the errors of the court below. Questions which were not presented to or decided by that court *are not open for review here,* because the trial court *cannot* be guilty of an error in a ruling that it has never made, upon an issue to which its attention was never called (citing many cases). In Robinson & Co. v. Belt, 187 U. S. 41, the province of the appellate court is stated in the following language: 'While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention and that their action should not be revised upon questions which the astuteness of counsel in this court have evolved from the record. It is not the province of this court to retry these cases de novo.' "

In Montana Ry. Co. v. Warren, 137 U. S. 348-351, the court said:

> "Error is alleged in the judgment of the Supreme Court of the Territory; and *if in all matters presented to it, its rulings were correct it cannot be affirmed that its judgment was erroneous,* because there were in the record matters not vital to the question of jurisdiction or the foundation of right, but simply of procedure to which its attention was not called and in respect

to which its judgment was not invoked. *All such matters must be considered as waived by the complaining party.*

"It is fundamental that when the judgment of a court is challenged in error *its rulings alone are open to consideration.*

"Of course if the trial court had no jurisdiction that is a matter which is always open, and the attention of the court of last resort may be called thereto in the first instance but mere matters of error may always be waived *and they are waived* when the attention of the reviewing court is not called to them."

V.

CONCERNING LIABILITY OF PLAINTIFF IN ERROR THOS. B. DILLON UNDER JUDGMENT OF THE COURT BELOW.

The judgment of the court below after deduction of the $4000 on the motion for a new trial is, that the plaintiffs below have and recover from the defendants the sum of $28,000.00 with interest and costs "and that said judgment be satisfied of the separate property of Mary J. Dillon and the community property of Mary J. Dillon and Thos. B. Dillon".

It is submitted that this judgment is correct and proper. Under the law of California, when a married woman is sued, her husband must be joined with her.

Code of Civil Procedure, section 370;
Horsburgh v. Murasky, 169 Cal. 500.

The husband's common law liability for the antenuptial debts of his wife still prevails in California.

In Van Maren v. Johnson, 15 Cal. 308-313, the court said:

> "The separate property of the wife and the common property of both husband and wife are equally liable for the debts of the wife contracted previous to her marriage and *judgments recovered for such debts may be enforced against either class or both classes of property indiscriminately.*"

This case has been many times cited with approval. It was quoted from at length in Henley v. Wilson, 137 Cal. 237, and the doctrine above set forth was declared to be the settled law of California.

The provisions of the judgment in the case at bar, ordering that the judgment be satisfied out of the separate property of Mary J. Dillon and the community property of Mary J. Dillon and Thos. B. Dillon *and exempting from the operation of the judgment the separate property of Thos. B. Dillon* is in accordance with section 170 of the Civil Code of California and is correct and proper in all particulars. But discussion of this matter in the case at bar would be of merely academic interest for the reason that Thos. B. Dillon has no separate property except what he received as a gift from his wife and *there is no community property of any kind or amount.*

It is respectfully submitted that there was no erroneous ruling of the trial court relating thereto.

VI.

THERE IS NO RULING OF THE LOWER COURT PRESENTED TO THIS COURT FOR CONSIDERATION.

As shown by the foregoing, there was *no ruling* made by the trial court *prior to the trial.* The demurrer having been waived in the manner hereinabove indicated, there was no request to the court prior to the trial to make any ruling whatever in the case nor was any ruling made, therefore it is respectfully submitted *there could be no error of the lower court prior to the trial.*

During the trial not a single exception nor objection was saved and, as stated by this court in the Mitsui v. St. Paul Fire Insurance Company, *supra, no question of law arising at the trial can under such circumstances be presented to or considered by this court.* Therefore it is submitted that there is no error of the trial court before this court for consideration and since "This court can consider only errors of law in the rulings of the lower court" (Jones v. U. S., *supra*) and since no rulings of the lower court are challenged or presented for review in the manner required by law, it is respectfully submitted that the judgment of the court below should be affirmed.

It is submitted that the writ of error does not present to this court a single error of the court below or discuss a single error of the court below. The case presented by the plaintiffs in error is a seeming attempt to have this court pass upon the *result* of the trial in the lower court without pre-

senting to this court any of the evidence upon which the case was decided.

The law of the State of California concerning the affirmance by appellate courts of the judgment of trial courts is as set forth in Sledge v. Stolz, *supra,* wherein the court quotes section 4½ of article VI of the Constitution of California, to wit:

> "No judgment shall be set aside * * * for any error as to any matter of pleading or for any error as to any matter of procedure unless after an examination of the enitre cause, *including the evidence,* the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

And the policy of the national courts relating thereto is set forth in the Act of February 26, 1919, amending section 269 of the Judicial Code so as to make the section read as follows:

> "Sec. 269. All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

In Camp v. Gress, (June 2, 1919) 39 Sup. Ct. Rep. 478-482, the Supreme Court said:

> "And by the Act of February 26, 1919, (Public—No. 281—65th Congress), amending section

> 269 of the Judicial Code (Comp. St. § 1246) the duty is especially enjoined of giving judgment in appellate proceedings, 'without regard to technical errors, defect, or exceptions which do not affect the substantial rights of the parties'."

Wherefore the defendants in error submit that there is no error of law in any of the rulings of the lower court presented to this court for consideration in the manner required by law, and that therefore *there is no question which was decided by the lower court nor any ruling made by that court, which is now open for review by this court.*

The counsel for plaintiffs in error would seem to concede this to be true when he says in his brief on page 2 thereof, that "the assignment of errors urged by them are such as appear upon the face of the complaint" *and he thereafter fails to point out or even mention any error appearing upon the face of the complaint or even appearing upon the record.*

It is most difficult to answer such a brief when one is mindful of the rules promulgated by this court concerning the errors that this court will review and how such errors must be presented to it.

No attempt is made by plaintiffs in error to comply with the rules relating to the manner in which errors of law of the lower court shall be presented to this court for review but instead thereof and in utter disregard of all of such rules in his brief he sets forth several contentions unsupported by and unaccompanied by any of the evidence, seemingly

for the purpose of complaining of the judgment pronounced by the court below after a long trial, *but without pointing out or attempting to point out a single erroneous ruling or error of any kind, which is open for review by this court.* Counsel for defendants in error feels that he is not called upon, nor would he be justified in attempting, to answer such contentions although each and all of them might easily be shown to be without merit.

The defendants in error therefore respectfully urge that the judgment of the court below be affirmed, and if it shall appear to this court that the propositions advanced by plaintiffs in error are entirely wanting in substance and that writ of error herein was sued out merely for delay, the defendants in error ask that they be awarded such damages as to this Honorable Court may seem proper.

Dated, San Francisco,
June 5, 1920.

Respectfully submitted,
JOHN L. TAUGHER,
Attorney for Defendants in Error.